

29 January 2020

The Hon. Christian Porter MP
Attorney General and Minister for Industrial Relations
House of Representatives
PO Box 6022
Parliament House
Canberra ACT 2600

Dear Minister,

#### Improving the performance of the Fair Work Commission

Resources and energy employers continue to hold serious concerns about the performance, structure and resourcing of Australia's national industrial relations tribunal, the Fair Work Commission (FWC).

Such concerns include unjustifiable delays in the approval of enterprise agreements; over-allocation of ALP-appointed tribunal members to Full Bench matters of significance; unfair dismissal decisions that undermine management in areas including bullying and safety; and over-reliance on public sector conciliators to perform the duties of statutorily-appointed tribunal members.

This briefing summarises these key areas of concern and proposes reasonable steps the Morrison Government could take to improve the performance of the FWC and restore the confidence of not only resources and energy employers, but those across all business sectors, in the effective functioning of Australia's most important employment institution.

#### 1. Composition of the FWC

Refer <u>Attachment 1</u> – Fair Work Commission Composition & <u>Attachment 2</u> - Media Release Friday 7 December 2018, New appointments to the Fair Work Commission

As of the date of this correspondence, 29 January 2020, the FWC comprises 42 members – 23 Presidential level members and 19 Commissioners.

The most recent appointments were announced on 7 December 2018 by then-Minister for Jobs and Industrial Relations, Kelly O'Dwyer, comprising of six new appointees that commenced in early 2019.

When the Coalition announced these appointments, FWC President Justice lain Ross made it widely known he did not support them, stating he only required one additional member, not six.

Putting aside that it is the role of government, not the President, to determine the appointment of tribunal members, the President's position was at odds with his own public statements in 2012-2013 when he complained of having insufficient resources to manage the tribunal's expanding workload and responsibilities, such as the new jurisdiction to deal with workplace bullying.

Further, when the former ALP Government left office on 18 September 2013 the FWC comprised of 46 members – four more than today (soon to be seven more with three pending retirements in the next 12 months).





AMMA encourages the Morrison Government to restore FWC numbers to at least 2013 levels through a minimum of four new appointments. In AMMA's view, these appointees should be at the Commissioner level with strong consideration to those with legal qualifications and / or business experience.

Noting the positive feedback of AMMA members regarding the Coalition's recent efforts to address the gender imbalance of the FWC (now standing at 40 per cent female and 60 per cent male), we would welcome additional female appointments to further ensure the tribunal is more reflective of contemporary society than it has been in the past.

#### 2. Treatment of 2018 appointees / politicisation of the tribunal

Refer <u>Attachment 3</u> – AFR Article 14 January 2019, Fair Work president 'sidelines' Coalition appointees.

Perhaps more unedifying than the FWC President's inconsistent statements about the tribunal's resourcing needs is the reported treatment of the 2018 Morrison Government appointees.

Put simply, some of the new appointees have been treated very shabbily.

While having the same statutory standing as existing FWC members, the President made it known that five of the new appointees would be treated differently to existing members through allocation of specific types of work. To both publicly state this intention and enact it in practice, is an extraordinary abrogation of the President's responsibilities and can only be concluded as an act of political spitefulness towards new appointees.

Several of the new appointees awaited months and months for a single meeting or communication with the President and this only occurred eventually at their initiative. It has been well over a year since the appointments were announced and it is widely understood that not all have yet had a meeting or single communication with the President.

A former member of FWC in the attached AFR article, referred to the President's treatment of the new members, including assigning them to lesser duties, as 'petty'. This might have been expected however, given the FWC President's history of politicising the resourcing of the tribunal.

It is a matter of public record that in 2012 (stated at Senate Estimates) President Ross was involved in multiple private discussions with then-ALP Minister for Workplace Relations, Bill Shorten, seeking either one or two new Vice Presidential appointments.

Despite little justification and no budget allocation, the former ALP Government did appoint two new FWC Vice Presidents, effectively demoting the existing two Vice Presidents appointed by the former Howard Coalition Government.

Almost immediately following the commencement of one of the Vice Presidents, Adam Hatcher (a barrister and former TWU legal officer and ALP Candidate for the federal seat of Mackellar), President Ross indicated that he would be delegating his powers to Vice President Hatcher to manage the appeals roster, including the composition of benches.

There are numerous examples of recently departed FWC Presidential members, all Coalition appointees, who claimed to have been overlooked from key FWC Full Bench determinations under this system of allocation.

Consider, for example, that the "Penalty Rates Case" (FWCFB 1001) involved five tribunal members (Ross, Catanzariti, Asbury, Hampton & Lee), all of whom are ALP appointees. Another Full Bench decision handed down earlier this month (2020 FWCFB 306) comprised of Vice President Hatcher and two ALP appointed commissioners. While Coalition appointees are now in the majority, it often appears they are just "unlucky" when Full Benches are determined.

#### 3. Enterprise Agreement approval processes

Refer Attachment 4 - FWC Appeal Decision [2019] FWCFB 7599.

The internal dysfunction and politicisation of the FWC is clearly impacting on the tribunal's capacity to support positive employment outcomes in the Australian economy. The most common area of grievance for employers is the unjustifiable delays in Enterprise Agreement (**EA**) approvals.

Despite a collapse in the number of EA's being submitted to the FWC for approval (there has been a 53% decrease in the number of private sector EAs since the Fair Work Act (**FW Act**) was introduced in 2009), the median time for enterprise agreement approval in 2017-18 was 76 days.

In 2019, the FWC stated in its annual report this median approval time had been reduced to 35 days.

It is AMMA's understanding this "improvement" was in-part impacted by a large number of very similar construction industry EAs being approved immediately prior to the 2019 Federal Election, along with some changes to the FWC's administration processes.

Evidence from several AMMA members indicates approvals have not improved:

- One AMMA member waited 125 days to receive agreement approval, delaying pay rises and other benefits for employees, primarily due to the "unheard" number of undertakings required.
- Another AMMA member fought for over 12 months from lodgement to have its enterprise agreement approved by the FWC.
- Another AMMA member had an agreement rejected by the FWC, despite being endorsed by over 70% of the workforce, after the union raised during the approval process a very technical issue it had discovered more than 12 months prior.

A key underlying cause for these delays has been the overly-technical and highly inefficient application of the approvals processes by some members of the FWC. This unnecessarily strict approach has resulted in a great degree of inconsistency from the FWC as to whether agreements meet statutory criteria, the BOOT, or require undertakings in order to be approved.

As a result of the pedantic assessment process employers are increasingly required to make undertakings, often based on highly unlikely hypothetical scenarios, adding to the administrative burden on employers seeking approval of enterprise agreements.

It is further ludicrous that the FWC has now set itself a deadline of up to four months to process and approve "complex" enterprise agreement applications. This is simply absurd for AMMA members, many whom are contractors in the highly competitive resources and energy sector and require quick turnaround of in-term agreements to successfully tender for work and keep people in employment.

This is not just a resources and energy sector problem. In the retail industry, for example, an agreement lodged on 12 December 2018 was ultimately approved on 11 November 2019, following a FWC appeal process. The effect here was 32,000 employees waiting 11 months for a pay increase.

The FWC is an administrative tribunal, not a court. It should prioritise administrative efficiencies above all else, but currently takes an eternity to process the FW Act's fundamental employment instrument - enterprise agreements. Given the unnecessary complexity and inefficiencies, it is no wonder the utility of enterprise agreements is in steep decline.

#### 4. Unfair dismissals and general protections

Other areas of employer concern about the performance of the FWC include its administration of unfair dismissal and general protections ("adverse action") matters.

#### Unfair dismissals

Regarding unfair dismissals, some members of the FWC appear determined to undermine the responsibility of business managers to protect their employees, customers and the general public.

The ability for an employer to take action to maintain a safe and healthy work environment for all employees is critically important, including for example after operating heavy machinery whilst under the influence of drugs, or for proven allegations of sexual harassment or violence in the workplace.

Take the following cases where employers have been dragged over the coals for simply carrying out their responsibilities to maintain a safe workplace:

- A resources employer dismissed an employee after he made abusive comments to a contractor (who later attempted suicide), including saying, "You're a f\*\*king scab". On appeal the FWC Full Bench found the termination was harsh, as his scab comment was only one act of harassment. He was awarded over \$68,000 in compensation.
- A fuel tanker driver was dismissed for driving his 14.5 tonne tanker 28 km/h above the speed limit on a noted high-risk stretch of road. The FWC found there was a valid reason for the dismissal however reinstated the driver for reasons including due to his contrition and the likely impact of dismissal given his age (65) and length of service (39 years).
- A crane operator on his final warning was dismissed after dropping a large steel coil onto a
  walkway his third serous safety breach in 12 months. The FWC found a valid reason for
  dismissal but reinstated the operator due to factors including his age, length of service and
  mortgage. In his decision the FWC member took into account his own experiences in dealing
  with the employer when he was a union organiser many years ago.

Where an employee is terminated for serious misconduct there should be no question of reinstatement. Where a business has made the decision to terminate an individual's employment based on the facts and circumstances at hand in the wake of serious misconduct that decision should stand. Yet some members of the FWC, time and time again, are determined to substitute their own decisions for that of the employer.

The spectrum of experience of FWC members (most have never run a business) can sometimes be confined to a narrow background of adversarial industrial relations. To have such administrative tribunal members substitute their decisions for that of experienced business managers on workplace health and safety protocols is often viewed as more frightening than enlightening.

#### General protections

General protections / adverse action matters are an even greater basket case. The FWC is failing to effectively mediate these matters at the tribunal level, instead seeing a record number of matters reach the Federal Court jurisdiction, clogging up the court system and costing employers hundreds of thousands of dollars in legal fees.

A key reason for this is the FWC's over-reliance on public servant conciliators to deal with adverse action claims. While several AMMA members have reported professional and satisfactory outcomes, others have complained that some conciliators seem more determined to see matters settled (paying of "go away money") instead of assessing the merits of claims, to which there often are none.

Such complaints are clearly not uncommon with the FWC's annual reports showing 113 formal complaints were made about staff conciliators over the past four years – or 4.5 times the number of complaints made about tribunal members themselves. Notably, these are just the formal complaints; most users of the FWC's services are repeat customers and loathe to lodge a formal complaint.

As a point of principle, it is bad policy to have virtually anonymous public servants working to 'settle' adverse action matters where a more experienced FWC member would have more gravitas in advising unmeritorious applicants that their cases have no prospects of success.

There is also an alarming lack of transparency around these conciliators, last reported in the FWC's 2017-2018 Annual Report to number 36, and who are paid circa \$125,000-\$150,000 per annum to perform duties that should be allocated to statutorily-appointed tribunal members. Information on their prior careers, the appointment process and selection criteria is nowhere to be found, but a quick scan on LinkedIn identifies several former FWC staff members, including associates to ALP-appointed FWC members, and union officials.

The role of public servant conciliators should be limited to assisting tribunal members, not replacing them. Statutorily-appointed members of the FWC should deal with Adverse Action claims as intended under the FW Act. This would see a greater number of matters resolved, or in many cases dismissed, at the FWC level instead of seeing vexatious claims fail in conciliation and reach the costly court jurisdiction.

#### 5. Conclusion

The dysfunction and inefficiencies at the FWC are compounding legislative challenges with the current FW Act. Improving the performance of the tribunal would go a long way towards resolving many of the concerns of employers with Australia's present day workplace relations system.

AMMA encourages the Morrison Government to consider a full scale review of the FWC to examine how its resources and public funding could better support positive workplace outcomes to the benefit of the Australian economy and wider community. Terms of reference could also include recommending processes for transparent review of Full Bench allocations and assessing individual tribunal member workloads and performance.

The Productivity Commission may be an appropriate vehicle to lead such a review, given its past experience in reviewing the functioning of the entire workplace relations system in 2015, and to ensure such a review is fundamentally grounded in productivity, administrative efficiency and reducing red tape for employers and employees alike.

AMMA further wishes to reiterate our aforementioned position that further appointments to the FWC, along with more balanced and evenly distributed allocation of the tribunal's existing resources, would go a significant way towards addressing many of these longstanding concerns.

Finally, we encourage the government to seek more transparency of the FWC and its President around the allocation of senior tribunal members to significant Full Bench matters. The FWC today comprises members with greater diversity of career backgrounds and practical business and legal experience, than it did when the former ALP government left office in September 2013. There appears to be little justification to underutilise this greater diversity of tribunal expertise.

I would be pleased to meet with you to discuss these matters in further detail should you require.

Regards.

Steve Knott Chief Executive Attachment 1 – Fair Work Commission Composition (January 2020)



### Fair Work Commission Composition Document as at 24 January 2020

PRESIDENTIAL (Total 24)		
Justice IJK Ross AO	Р	
A Hatcher	VP	
J Catanzariti AM	VP	
RS Hamilton	DP	
PJ Sams AM	DP	
A Booth	DP	
IC Asbury	DP	
VP Gostencnik	DP	
J Kovacic	DP	
GE Bull	DP	
M Binet	DP	
WR Clancy	DP	
LE Dean	DP	
P Anderson	DP	
A Colman	DP	
I Masson	DP	
A Beaumont	DP	
A Millhouse	DP	
T Saunders	DP	
G Boyce	DP	
B Cross	DP	
A Mansini	DP	
N Lake	DP	
J Young	DP	

COMMISSIONERS (Total 18)	
PJ Spencer	
BD Williams	
DS McKenna	
IW Cambridge	
PJ Hampton	
MP Bissett	
CF Simpson	
T Lee	
S Booth	
B Riordan	
LAT Johns OAM	
NP Wilson	
T Cirkovic	
C Platt	
K Harper-Greenwell	
J Hunt	
S McKinnon	
L Yilmaz	

Total Coalition =	23
Total ALP =	19

KEY		
Italics, bold	talics, bold Denotes female appointees	
	ALP	
	Coalition	

#### **Analysis**

- (46) Forty-six FWC members when the ALP left office on 7 September 2013
- (42) Currently forty-two FWC members
- (24) Twenty-four FWC members are at the Presidential level
- (18) Eighteen FWC members are at the Commissioner level
- (17) Seventeen out of (42) forty-two FWC members are female

Attachment 2 – Media Release Friday 7 December 2018, New appointments to the Fair Work Commission

# New appointments to the Fair Work Commission

Friday 7 December 2018 Media Release

The Hon Kelly O'Dwyer MP

- Minister for Jobs and Industrial Relations
- Minister for Women

The Coalition Government has appointed six new Deputy Presidents and a Commissioner to the Fair Work Commission.

Minister for Jobs and Industrial Relations, the Hon Kelly O'Dwyer MP, said that the appointments will ensure that the Fair Work Commission continues to play a vital role ensuring our workplace relations system operates in a fair and transparent manner and promote a constructive and cooperative environment for Australians in the workplace.

"These additional appointments will give the Fair Work Commission the ability to approve pay increases and better working conditions more quickly for Australian workers," Minister O'Dwyer said.

"The appointees bring an impressive breadth of knowledge, qualifications and experience in workplace relations to the Fair Work Commission."

"This group of appointees is highly qualified and well regarded in their respective professions. I am confident the appointees will bring comprehensive expertise and valuable skills to the Fair Work Commission," Minister O'Dwyer concluded.

The Government has made the following appointments:

- Mr Tony Saunders, Deputy President
- Mr Nicholas Lake, Deputy President
- Mr Gerard Boyce, Deputy President
- Mr Bryce Cross, Deputy President
- Ms Amanda Mansini, Deputy President
- Ms Janine Young, Deputy President
- Ms Leyla Yilmaz, Commissioner

The terms of these appointments are from the date of commencement until the appointees reach the statutory retirement age of 65 or they resign.

# **Background Information Appointees to the Fair Work Commission**

#### **Mr Tony Saunders**

Mr Saunders has been a Fair Work Commissioner since his appointment in 2015. Before that, he was a Barrister specialising in workplace relations litigation including employment claims, industrial disputes, discrimination and work health and safety. Mr Saunders previously worked as a Senior Associate in the Litigation Department at Allens law firm (now Allens Linklaters). Mr Saunders' appointment will commence on 10 December 2018.

#### Mr Nicholas Lake

Mr Lake is an independent consultant with more than 30 years' experience in human resources, most recently as the Executive Director of Human Resources for the Queensland Department of Health. He previously held senior Human Resources positions, both in Australia and internationally, in organisations including BHP Coal, Incitec Pivot Limited, ANZ Banking Corporation and Philip Morris International. Mr Lake's appointment will commence on 7 January 2019.

#### Mr Gerard Boyce

Mr Boyce is a barrister with more than 20 years' experience in employment law and workplace relations. Before being admitted to the Bar in 2006, he held various senior workplace relations roles in the mining, building, electrical and aged care industries. His experience includes roles as New South Wales State Manager of the Australian Mines and Metals Association and Industrial Relations Manager for the New South Wales branch of the National Electrical and Communications Association. Mr Boyce's appointment will commence on 14 January 2019.

#### Mr Bryce Cross

Mr Cross has been a barrister at Frederick Jordan Chambers since his admission to the New South Wales Bar in 1997. Between 1993 and 1997, he was an Industrial Advocate and Corporate Head Solicitor at the Chamber of Manufactures of New South Wales / Australian Business Limited (now the NSW Business Chamber Limited). He was admitted to the Supreme Court of NSW in 1991 as a solicitor. Mr Cross has been an Industrial Officer at the NSW Nurses' Association and the Commonwealth Steamship Owners' Association, and has also been employed by the Australian Gaslight Company. Mr Cross' appointment will commence on 1 February 2019.

#### Ms Amanda Mansini

Ms Mansini has been the Director of Workplace Relations and Legal Counsel for the Australian Mines and Metals Association since 2016 and was the Manager of Workplace Relations for four years before that. Prior to joining AMMA, Ms Mansini was a Senior Associate and Solicitor at Freehills (now Herbert Smith Freehills). Between 2006 and 2008, she was an Associate to Senior Deputy President Peter Richards and Commissioner Paula Spencer in the predecessor bodies to the Fair Work Commission. Ms Mansini's appointment will commence on 4 February 2019.

#### Ms Janine Young

Ms Young has been a Partner at Corrs Chambers Westgarth specialising in employment and labour law since 2011, having worked as an employment and labour law specialist with Corrs since 2007. Prior to this Ms Young was a workplace relations lawyer at Mallesons Stephen Jaques. She was admitted as a Barrister and Solicitor to the Supreme Court of Victoria in 1997. Ms Young's appointment will commence on 11 March 2019.

#### Ms Leyla Yilmaz

Ms Yilmaz is the Principal of LLY Business Consultancy Pty Ltd. From 2015 to mid-2018, she was Deputy Executive Director of the Victorian Automobile Chamber of Commerce (VACC), an employer organisation representing the interests of predominantly small businesses in the automotive industry. Between 1997 and 2015, she was the VACC's Industrial Relations Manager and then General Manager of Industrial Relations, Occupational Health and Safety Education and Training. Ms Yilmaz was on the Australian Chamber of Commerce and Industry Council (ACCI) from 2008 to 2018 and a member of ACCI's Workplace Policy Committee for 25 years. Ms Yilmaz's appointment will commence on 18 February 2019.

Attachment 3 – AFR Article (14 January 2019) Fair Work president 'sidelines' Coalition appointees

# Fair Work president 'sidelines' Coalition appointees

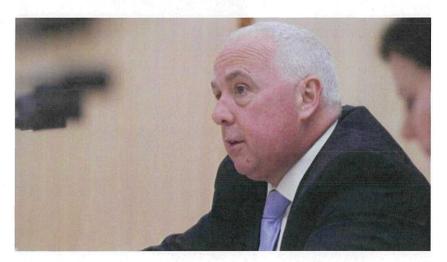


David Marin-Guzman, Workplace correspondent Jan 14, 2019 — 11.45pm

Fair Work Commission president Iain Ross is sidelining the Morrison government's new employer-dominated commission appointments to lesser duties in a move some insiders say is "unprecedented".

The government appointed six new commission members last month, most from employer backgrounds, sparking outcries from Labor that the Coalition was stacking the commission.

However, in a letter seen by *The Australian Financial Review*, Justice Ross told commission members that the new appointees, paid \$461,850 a year, would mostly be doing conciliation work and other minor matters rather than deciding cases.



Fair Work Commission president Iain Ross previously told the government that new appointments were not needed. *Alex Ellinghausen* 

The president, a former assistant secretary with the Australian Council of Trade Unions, had previously informed the government that only one new commissioner was necessary to replace departing commissioner Anna Cribb.

But Industrial Relations Minister Kelly O'Dwyer went on to appoint an additional six new deputy presidents, a position usually assigned to full bench cases.

Ms O'Dwyer said at the time that the appointments would allow the commission to cope with its workload more effectively.

The appointments followed data showing most employers are now waiting 76 days to get their enterprise agreements (EAs) approved, more than double the commission's 32 days target.

### 'Unprecedented' move

In his letter, Justice Ross said one new appointee would take on Mr Cribb's work and another promoted member would continue under current arrangements.

But the other new appointees would, for the short term, chiefly mediate general protections claims, handle requests for extension of time and work on "some" contested EA cases.



Minister for Jobs, Industrial Relations and Women Kelly O'Dwyer appointed six new members to the commission last month. Alex Ellinghausen / Fairfax Media

One former commission member told *The Australian Financial Review* that restricting new appointees to conciliation – work usually done on the phone by professional mediators – was "unprecedented".

The former member said traditionally the president simply appointed new members to panels specialising in particular industries.

While there might be some training if necessary, it was not prescribed and had never involved assigning new members to lesser duties.

"It's petty – it's a dispute between [Justice Ross] and the minister," the former member said.

In his letter, Justice Ross cited Ms O'Dwyer's rationale for the new appointees as a response to concerns over commission members not being given conciliation work.

Employer groups have long complained about Justice Ross delegating public servant conciliators rather than commission members to mediate complex legal cases such as general protection and adverse action claims.

Former vice-president Graeme Watson, who now advises Ms O'Dwyer, was a strong critic of the practice as he argued it encouraged business to apply an "economic" approach to settlements.

# Costs cut to pay for commission members

Assigning the new members to conciliation – potentially replacing contract conciliators – may also assist Fair Work's budget given the government has not assigned extra money to pay for them.

Justice Ross said in his letter that the new appointments raised "significant challenges" for the commission.

He said the costs of the new appointments would total \$4.6 million from 2018 to the end of the 2020 financial year. That amounted to 10 per cent of all staff expenditure, he said.

As a result he had taken action to cut costs, including by reducing travel spending so members would have to participate in some appeal cases by video if they were held inter-state.

He had also scaled back and deferred projects, reviewed all contractor and ongoing positions, and was not filling vacant staff positions.

#### Fair Work refuses to comment

In response to questions about the new members, Fair Work general manager Bernadette O'Neill said "the commission will not make any comment in relation to the work of individual members".

She said that the commission "has not been advised of any additional funding for the new appointees".

Australian Mines and Metals Association chief executive Steve Knott said "it is expected the six new appointments ... will discharge the full range of duties expected of a FWC commissioner or deputy president".

But he said "it is expected ALL FWC members will be actively engaged in general protection claims in lieu of public service conciliators".

"General protection claims are on the rise. Federal Court proceedings associated with such claims often exceed \$100,000.

"Accordingly FWC member expertise in such matters, not conciliators, is a reasonable expectation for matters of such significance."

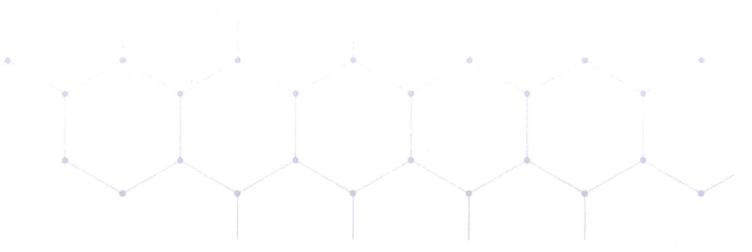
New deputy presidents who have started at the commission include Nicholas Lake, a senior human resources manager at BHP Billiton and ExxonMobil, and Gerard Boyce, a barrister who had worked for the AMMA and the National Electrical and Contractors Association.

Incoming members include Bryce Cross, a barrister who used to head the Chamber of Manufactures in NSW, Amanda Mansini, the director of workplace relations at AMMA, and Janine Young, a partner at law firm Corrs Chamber Westgarth.

The appointments mean most members of the Fair Work Commission are now Coalition appointments.

Asked last month if Labor would consider spilling the commission if it won the election, opposition employment spokesman Brendan O'Connor told reporters that "it's a very big step for us to consider but we'll have to think our way through that".

Attachment 4 – FWC Appeal Decision [2019] FWCFB 7599





# **DECISION**

Fair Work Act 2009 s.604 - Appeal of decisions

**Appeal by Shop, Distributive and Allied Employees Association** (C2019/5635)

**Appeal by Kmart Australia Limited t/a Kmart** (C2019/5636)

**Appeal by The Australian Workers' Union** (C2019/5771)

VICE PRESIDENT HATCHER DEPUTY PRESIDENT MASSON COMMISSIONER JOHNS

SYDNEY, 11 NOVEMBER 2019

Appeals against decision [2019] FWC 6105 of Deputy President Mansini at Melbourne on 2 September 2019 in matter number AG2018/6995.

#### Introduction

- The Shop, Distributive and Allied Employees' Association (SDAEA), Kmart Australia Limited (Kmart) and the Australian Workers' Union (AWU) have lodged appeals, for which permission to appeal is required, against a decision made by Deputy President Mansini on 2 September 2019<sup>1</sup> (Decision) to dismiss Kmart's application for approval of the *Kmart Australia Ltd Agreement 2018* (Agreement). The SDAEA and the AWU were union bargaining representatives in the process of negotiating and making the Agreement, and supported Kmart's application for approval of the Agreement. The only person which opposed the approval of the Agreement was the Retail and Fast Food Workers Union Incorporated (RFFWUI), which acted as a bargaining representative for two employees out of a total workforce covered by the Agreement of over 32,000.
- [2] The Deputy President dismissed the application on the basis that she was not satisfied that the Agreement was genuinely agreed to by the employees covered by the Agreement, as required by s 186(2)(a) of the Fair Work Act 2009 (FW Act), because she was not satisfied that the Agreement was "made" in accordance with s 182(1) on the basis of a finding that Kmart did not request employees to vote who were employed at the time of the voting process and would be covered by the Agreement. Kmart, the SDAEA and the AWU all contend in their appeals that this conclusion was in error. Only the RFFWUI opposes the appeals, notwithstanding that it never raised this issue in the proceedings before the Deputy President.

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<sup>1 [2019]</sup> FWC 6105

<sup>&</sup>lt;sup>2</sup> Ibid at [75]

#### Legislative framework

[3] An enterprise agreement requires approval by the Commission in order to have legal effect under the FW Act. Section 186(1) of the FW Act establishes a "basic rule" that, where an application for approval of an enterprise agreement has been made, the Commission must approve the agreement if the requirements set out in ss 186 and 187 are met. One of those approval requirements, set out in s 186(2)(a) and applicable only to non-greenfields agreements, is that the Commission must be satisfied that the agreement has been "genuinely agreed to" by the employees covered by the agreement. Section 188 defines when employees may be considered to have genuinely agreed to an enterprise agreement as follows:

#### 188 When employees have genuinely agreed to an enterprise agreement

- (1) An enterprise agreement has been *genuinely agreed* to by the employees covered by the agreement if the FWC is satisfied that:
  - (a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:
    - (i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);
    - (ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and
  - (b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and
  - (c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.
- (2) An enterprise agreement has also been *genuinely agreed* to by the employees covered by the agreement if the FWC is satisfied that:
  - (a) the agreement would have been *genuinely agreed* to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and
  - (b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174.
- [4] Section 188(1)(a)(i) establishes as an element of the genuine agreement requirement the necessity of compliance (subject to s 188(2)) with the "pre-approval steps" specified in s 180(2), (3) and (5). Section 180 relevantly provides as follows:

#### 180 Employees must be given a copy of a proposed enterprise agreement etc.

Pre-approval requirements

(1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.

Employees must be given copy of the agreement etc.

- (2) The employer must take all reasonable steps to ensure that:
  - (a) during the access period for the agreement, the employees (the *relevant employees*) employed at the time who will be covered by the agreement are given a copy of the following materials:
    - (i) the written text of the agreement;
    - (ii) any other material incorporated by reference in the agreement; or
  - (b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.
- (3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:
  - (a) the time and place at which the vote will occur;
  - (b) the voting method that will be used.
- (4) The *access period* for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).

Terms of the agreement must be explained to employees etc.

- (5) The employer must take all reasonable steps to ensure that:
  - (a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and
  - (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.
- [5] Section 181, which is referred to in s 180(1) and (4), provides:

. . .

181 Employers may request employees to approve a proposed enterprise agreement

3

- (1) An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.
- (2) The request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) (which deals with giving notice of employee representational rights) in relation to the agreement is given.
- (3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.
- [6] Section 182(1) and (2), which are referenced in s 188(1)(b), provide:

#### 182 When an enterprise agreement is made

Single-enterprise agreement that is not a greenfields agreement

(1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is *made* when a majority of those employees who cast a valid vote approve the agreement.

#### (2) If:

- (a) a proposed enterprise agreement is a multi-enterprise agreement; and
- (b) the employees of each of the employers that will be covered by the agreement have been asked to approve the agreement under subsection 181(1); and
- (c) those employees have voted on whether or not to approve the agreement; and
- (d) a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement;

the agreement is *made* immediately after the end of the voting process referred to in subsection 181(1).

[7] As noted below, the RFFWUI made reference in its submissions to s 172(2)(a), which provides:

Single-enterprise agreements

- (2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a *single-enterprise agreement*):
  - (a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or ...

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#### The Decision

- [8] Relevant to the appeals before us, the Deputy President in the Decision gave consideration to the question framed by her as: "Did Kmart request the employees employed at the time, who would be covered by the Agreement, to vote?" The chronology upon which this consideration proceeded, as identified in the Form F17 statutory declaration of Suzanne White, Kmart's Employee Relations Manager, which accompanied Kmart's application for approval of the Agreement, was as follows:
  - the last Notice of Employee Representational Rights was issued pursuant to s 173 on 7 September 2017;
  - employees were advised of the time, place and method of the voting process for the Agreement pursuant to s 180(3) on 12 November 2018; and
  - the electronic voting process that was used commenced on 21 November 2018 (being the first date upon which an employee could cast a vote) and concluded on 30 November 2018 (being the last date on which a vote could be cast).
- [9] The outcome of the voting approval process, as stated in Ms White's statutory declaration, was that there were 32,039 employees entitled to participate in the voting process, 23,110 had cast a valid vote, and 21,191 voted to approve the Agreement. Of the "voting cohort" of 32,039 employees, 21,881 were casual employees.
- [10] In a way which is critical to the appeals, the Deputy President commenced her consideration of the question she had identified by construing the relevant provisions of the FW Act as follows:
  - "[50] As summarised above, for the purposes of s.188(1)(b), the requirement at s.182(1) will be met if the cohort of employees asked to vote are the employees who were employed at the statutorily designated time and who fall within the coverage, however described, of the Agreement. These are questions of fact to be determined by reference to the evidence.
  - [51] 'The time' in this context means the period during which the employees were requested to vote to approve the Agreement. Whether it also includes the 7 (clear) day statutory access period occurring immediately prior to the vote may not be conclusively resolved but makes no difference to the outcome in this case. Accordingly, in the present case, I have taken both periods into account such that the designated time is the period from 12.00am on 14 November 2018 to 11.59pm on 30 November 2018."
- [11] It is apparent from the above passage that the Deputy President considered that, for the purposes of s 181(1), the "time" of the "request... to approve the agreement by voting for it" encompassed the period from the opening to the closing of the electronic voting process (21-

<sup>&</sup>lt;sup>3</sup> Ibid at [50]

<sup>&</sup>lt;sup>4</sup> Ibid at [15]-[16]

- 30 November 2018 inclusive) as well as, perhaps, the seven-day access period immediately prior to this (14-20 November 2018 inclusive).
- [12] The Deputy President then dealt with the issue raised by the RFFWUI concerning the voting process, namely that Kmart had allowed to participate in the voting process casual employees who were not employed at the relevant time. This issue arises because Kmart treated as "employees employed at the time" any casual employees "on its books" who had worked even one shift in the three months prior to the access period, 5 as well as 443 former terminated employees. 6 The Deputy President's conclusion on this issue was as follows:
  - "[63] Having regard to the above, it is apparent that Kmart cast the net too wide such that it requested employees to vote who were not eligible within the scope of ss.188(1)(b), 182(1) and 181(1). However this is not necessarily fatal to the success of the application in circumstances where it is established that a valid majority of those who were entitled to vote and did vote approved the agreement despite the error.
  - [64] In this respect, I accept the evidence derived from Kmart's payroll system that of its Voting Cohort 22,587 casuals was [sic] employed at the time because they worked in either the voting period or the access period between 14 to 30 November 2018.
  - [65] As the data at Attachment 3 shows, even deducting the ineligible broader pool from Kmart's Voting Cohort and assuming all ineligible persons voted and voted yes to approve the Agreement, the Agreement was approved by a majority."
- [13] The Deputy President next considered whether Kmart had excluded from the voting process employees who were in fact employed at the relevant time. This consideration proceeded upon the following facts which were described by the Deputy President as follows (footnotes omitted):
  - "[66] Ms White expressly declared the issue as follows:

"The Cohort included new hires, hired during the access period and any new hires engaged before the CorpVote cut-off date to update the Voter Roll at the end of 28 November 2018. No further updates were made to the Voter Roll due to the practicalities of the CorpVote system." (emphasis added)

- [67] It is plain from this statement that a deliberate decision was taken by Kmart to stop updating the Voter Roll from which its agent, CorpVote, was requesting employees to vote before the end of the voting period.
- [68] This admission is significant given that Ms White also declared her understanding that the voting cohort should be regarded as including employees employed during the access period and recruited during the voting period and who would be covered by the Agreement. To the extent of any generic references in the materials that may appear inconsistent, I consider the evidence of the cut-off date is specific and consistent with the objective documentary evidence.

<sup>&</sup>lt;sup>5</sup> Ibid at [55]

<sup>&</sup>lt;sup>6</sup> Ibid at [62]

[69] The time of the cut-off on 28 November 2018 and the number of employees engaged after this cut-off date is not before the Commission. The evidence before the Commission confirms the total number in the Voting Cohort as 32,039. That number is consistent with the declaration of ballot results, and also Ms White's declaration of the number in the final Voter Roll provided to CorpVote on 28 November 2018 said to include new hires and terminations "between 21 November and 28 November 2018".

[70] On the evidence, it is therefore apparent that the 32,039 employees in the Voting Cohort does not include employees who were engaged and worked on at least the last two days of the voting period (that is, at least 29 and 30 November 2018 and perhaps also all or part of 28 November 2018).

[71] A number of factors point to the likelihood that this category includes a number of employees, including: the evidence before the Commission that employees are engaged and requested to complete paid induction training, from home or in store, within 24 hours of signing their contract of employment; the data which shows an increasing workforce in the days leading up to the vote; and Ms White's evidence of the difficulty in providing precise data on any given day due to sheer volume of recruitments and terminations. Accordingly, it is conceivable that there are a number of employees who worked during the voting period (at least on 29 and 30 November 2018) but who were not requested to vote."

[14] On the basis of the above facts the Deputy President concluded that "Kmart did not request employees to vote who were employed at the time of the voting period and would be covered by the Agreement". The Deputy President regarded this a something which the FW Act did not contemplate occurring, and concluded:

"[75] In the circumstances, and on the evidence that is before the Commission, I consider that the decision to exclude employees employed at the time and would be covered by the Agreement means that I am not able to be satisfied that the Agreement was genuinely agreed to by the employees covered by the Agreement (s.186(2)(a)) because I am not satisfied the Agreement was made in accordance with s.182(1) and as required by s.188(1)(b).

[76] To the extent that this is, at least theoretically, a concern about which an undertaking may be accepted under s.190 I note that Kmart was afforded every opportunity but instead requested that the Commission exercise its discretion to determine the application on the materials that are before it. In any event, it is difficult to imagine how an undertaking could be framed or crafted as to appropriately satisfy the Commission having regard to the nature of the concern.

[77] In the alternative, for the foregoing reasons, there may be a question as to whether the Agreement was "made" in accordance with the Act at all."

[15] The Deputy President then considered whether the requirement for genuine agreement could be satisfied by reference to s 188(2), notwithstanding the finding that there had been

<sup>&</sup>lt;sup>7</sup> Ibid at [74](c)

<sup>&</sup>lt;sup>8</sup> Ibid at [72]

non-compliance with s 182(1). The Deputy President concluded that what had been found to have occurred was not an "error" because Kmart had made a "conscious decision not to comply", one was it "minor" given the underlying purpose and nature of the requirement which had not been complied with. 11

[16] The Deputy President went on to make findings as to the whether the other approval requirements were satisfied. It is not necessary to detail these at this stage, since they are not relevant to the appeals proper, except to say that the Deputy President found that the other requirements were either satisfied or were capable of being dealt with by way of undertakings. We will need to return to those other findings in due course, for reasons which will become apparent. The Deputy President's overall conclusion was that the Agreement "must not be approved" because she was not satisfied that the Agreement was genuinely agreed because of the exclusion of eligible employees from the voting cohort which had been found to have occurred. 12

#### Submissions and evidence

[17] The grounds of the appeals of the SDAEA, Kmart and the AWU were, in substance if not in expression, largely the same. Likewise they covered the same ground, or adopted each other's positions, in their written and oral appeal submissions. Therefore it is convenient to summarise their submissions jointly as follows:

- the Deputy President erred in failing to be satisfied that that the Agreement was genuinely agreed to on the basis of a finding that Kmart did not request employees who were employed only on 29 and 30 November 2018, and perhaps 28 October 2018, to vote to approve the Agreement;
- this error was the consequence of the Deputy President misconstruing s 181(1) as requiring that employees who were employed after the commencement of the voting process and prior to its conclusion were to be the subject of an employer request under that provision;
- the request contemplated by s 181(1) is to be directed only to those employees employed at the time of the request;
- the request is a single event which occurs at or prior to the commencement of the voting process, and the time of the request does not extend to any period after the commencement of the voting process;
- in any event, the number of employees who cast a vote in favour of the Agreement was on any view sufficient to constitute a valid majority for the purposes of s 182(1), so that the votes of any excluded employees could not have affected the outcome;

<sup>&</sup>lt;sup>9</sup> Ibid at [78]-[86]

<sup>10</sup> Ibid at [83]

<sup>11</sup> Ibid at [84]

<sup>&</sup>lt;sup>12</sup> Ibid at [144]-[145]

- the appellants were denied procedural fairness in that the Deputy President did not at any stage of the proceedings identify the concern which caused her to dismiss the application;
- if the Deputy President had identified her concern, the parties would have been in a position to address her as to the proper construction of s 181(1) and, further, Kmart would have been in a position to adduce evidence demonstrating that no employee had in fact been excluded from the voting process even on the basis of the Deputy President's preferred construction of s 181(1):
- alternatively, the Deputy President erred in finding that the exclusion of any employees employed on 28-30 November 2018 was not a minor error for the purpose of s 188(2) such as to preclude a finding that the Agreement was genuinely agreed to in accordance with that provision.
- [18] Kmart sought leave to tender in the appeal a statutory declaration made by Ms White dated 8 October 2019. We determined to admit the declaration, over the objection of the RFFWUI, because we considered (as briefly discussed later) that Kmart was denied the opportunity to adduce this evidence in the proceedings before the Deputy President and because it addresses the issue which caused the Deputy President to dismiss Kmart's application for the approval of the Agreement. Ms White's evidence was, in summary, that she had caused the preparation of a report concerning those employees, if any, who were hired in the period 28-30 November 2018 and, if they were hired in that period, each employee's status, the date they worked their first shift, and the date they completed paid online training for new hires. The report showed that:
  - a total of 92 persons were hired in the period: 22 on 28 November 2018, 56 on 29 November 2018, and 14 on 30 November 2018;
  - all of the 92 were engaged on a casual basis;
  - none of the 92 worked any shift in the period 28-30 November 2018; and
  - none of the 92 completed online training modules in the period 28-30 November 2018.
- [19] In relation to the last of the points above, senior counsel for Kmart confirmed that in fact no paid training was *undertaken* on the days in question, and that Ms White could be called to give that evidence if necessary. The RFFWUI declined the opportunity to cross-examine Ms White on her evidence. In the circumstances, we accepted the statement made by senior counsel as one upon which we could rely.

#### [20] The RFFWUI submitted that:

- the evidence of Ms White ought not be accepted;
- the expression "employed at the time" in s 181(1) means employees employed at the time of the request as well as the employees employed at the time of the making of the agreement, which are the same group;

- the request referred to in s 181(1) is not a single act occurring at a single point in time;
- s 172(2) permits a single-enterprise agreement to be made with the employees who are employed at the time the agreement is made, which occurs under s 182(2) after the end of the voting process;
- it is therefore clear that the request is made to those employees who make the agreement, and where the voting process is open for a number of days as here, the request is maintained during the voting process up until the end;
- the Deputy President was accordingly correct in determining that the Agreement was not made in accordance with s 182(1);
- where an agreement is not made in accordance with s 182(1), the application for its approval becomes otiose, and the issue of the materiality of the excluded votes is not relevant;
- the Deputy President was correct to determine that the deliberate exclusion of employees from the voting process did not constitute a minor error for the purpose of s 188(2); and
- there should be no entertainment of the appeal ground relating to procedural fairness in circumstances where Kmart continually urged for an urgent decision to be made on the papers.

#### Consideration

Permission to appeal

[21] We consider that the grant of permission to appeal in respect of each of the appeals would be in the public interest for two reasons: first, the appeals raise an important question concerning the construction of s 181(1) of the FW Act and, second, the decision not to approve the Agreement directly affects the employment entitlements of a large number of employees of a major employer in the retail sector. Accordingly, permission to appeal must be granted in accordance with s 604(2) of the FW Act.

Construction of s 181(1)

[22] As we have earlier set out, the Deputy President's decision to dismiss the application for approval of the Agreement was founded on a construction of s 181(1) of the FW Act whereby "the time" referred to in the provision is to be read as meaning "the period during which the employees were requested to vote to approve the Agreement" (emphasis added). The period referred to was understood by the Deputy President to be constituted by, or including (together with the access period) the period from the commencement to the conclusion of the voting process, which in this case was the ten-day period of 21 to 30 November 2018 inclusive. It was on the basis of this construction that the Deputy President found that Kmart's exclusion from the voting process of employees who were engaged and worked on 29 and 30 November 2018, and perhaps 28 November 2018 as well, meant that the

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<sup>13</sup> Ibid at [51]

Agreement had not been "made" in accordance with s 182(1). The principal question raised by the appeals is whether that construction is correct.

[23] Divisions 3 and 4 of Pt 2-4 of the FW Act contain a scheme of provisions concerning bargaining for, making and applying for approval of enterprise agreements. That scheme contains a series of time requirements concerning the taking of various steps required as part of the agreement-making process. The basic chronology established by the scheme was summarised by Jessup J (with whom White J agreed) in *National Tertiary Education Industry Union v Swinburne University of Technology*<sup>14</sup> (*Swinburne*) as follows:

"[22] Putting these provisions together in the chronological order which is implied by their terms, the following is the scheme contemplated. First, the employer agrees to bargain or initiates bargaining. Secondly, there is then a period of 14 days during which the employer gives the representational rights notices to the employees who were employed when the employer agreed to bargain. Thirdly, bargaining takes place. Although that process is not directly relevant to the subject here being considered, it should be noted that at least 21 days must pass after the giving of the last representational rights notification and the employer's request under s 181(1). But there appears to be no outer limit to that period. Fourthly, the employer gives a copy of the agreement upon which it is proposed that the employees should vote, and other required materials, to the employees employed at that time. Fifthly, no more than seven days later, the employer requests the employees who are employed at that time to approve the agreement by voting for it. Sixthly, when a majority of those employees who cast a valid vote approve the agreement, the agreement is made."

[24] It is apparent from the text of s 182(1) that, in respect of single-enterprise non-greenfields agreements, the making of a request by the employer for relevant employees to approve an agreement by voting for it under - that is, in accordance with - s 181(1) is a necessary precondition for the making of the agreement. What constitutes the necessary "request" for the purpose of s 181 is a little obscure. There is no definition of the term in the FW Act or the specification of any criteria by which it can directly be assessed when the request has been made. However there are a number of textual indicators concerning when the necessary "request" is presumed by the legislation to have occurred.

[25] First, s 180(1) provides that the requirements set out in s 180 (including those specified by s 180(2), (3) and (5)) must be complied with *before* the request is made under s 181(1). Because the requirement in s 180(2) pertains *during* the access period, that implies that the request must occur at or not before the end of the access period. Section 180(4) provides that the access period ends immediately before the start of the voting process referred to in s 181(1), which was interpreted in the Full Bench decision in *CFMMEU v CBI Constructors Pty Ltd*<sup>15</sup> to mean the end of the calendar day immediately preceding the day on which the voting process for a proposed agreement commences.

[26] Second, because the requirement in s 180(3) to take all reasonable steps to notify relevant employees of the time, place and method of the vote must occur by the start of the access period, and must by virtue of s 180(1) be complied with before the request under s

<sup>14 [2015]</sup> FCAFC 98, 232 FCR 246

<sup>&</sup>lt;sup>15</sup> [2018] FWCFB 2732

181(1), it is clear that this notification does not itself constitute the request but is a separate and anterior step.

[27] Third, the request that s 181(1) refers to is for relevant employees "to approve the agreement by voting for it". In ordinary parlance, a request for something to be done necessarily precedes the doing of the thing (or the opportunity to do the thing). Therefore, on an ordinary reading of s 181(1), the contemplated request must precede the voting process in which relevant employees may comply with the request and vote to approve the agreement, or not.

[28] Fourth, s 181(2) refers to a request not being "made" until at least 21 days after the last notice of employee representational rights is given. The word "made", read in its immediate context, suggests a single event that may readily be fixed in time for the purpose of the operation of the 21-day requirement. This receives some confirmation in the Explanatory Memorandum for the Fair Work Bill 2009, which states (at paragraph 737, emphasis added):

"The access period can run concurrently with the 21-day period referred to in subclause 181(2), so that the shortest period between the day on which an employer gives the last notice of employee representational rights to its employees and the day that the employer requests the employees to vote on the agreement is 21 days."

[29] The reference to "the day" on which the request tends to support the proposition that the request under s 181(1) is a single event which occurs at a particular point in time.

[30] Fifth, s 181(3) contemplates that the request may encompass the specification of the method by which the employees are to vote to approve an agreement. This provision presents some difficulty, in that compliance with s 180(3)(b) requires the employer to have already identified the voting method before the request is made. However it can at least be said, reading s 181(3) in a common-sense way, that a request which specifies the voting method must necessarily precede the voting process in which that voting method is used. The provision would be nonsensical otherwise.

[31] The above considerations lead us to conclude that the "request" contemplated by s 181(1) is a single act or event which occurs at the end of the access period and immediately prior to (or perhaps upon) the commencement of the voting process. This is consistent with the conclusion of Jessup J in Swinburne that the end of the access period "...presumably is the point in time at which the employer makes the request..." and that the access period is "at its later boundary, contiguous with the time of the request under s 181". It is also consistent with the tentative view expressed by the Full Bench in CFMMEU v CBI Constructors Pty Ltd<sup>17</sup> that the "request" aligns with the commencement of the voting process:

"[26] ... Section 181(1) only refers to a "request" by the employer that relevant employees vote to approve the agreement, without saying anything about the nature of the voting process. This suggests that the voting process starts when the employer requests that it take place. However what in practical terms constitutes such a request is obscure, although presumably a request is implicit when the employer

<sup>&</sup>lt;sup>16</sup> [2015] FCAFC 98, 232 FCR 246 at [21] and [25] respectively.

<sup>&</sup>lt;sup>17</sup> [2018] FWCFB 2732

begins the conduct of a voting process intended to seek approval of a proposed agreement that had earlier been notified pursuant to s 180(3)."

[32] Section 181(1) refers to the "request" being directed at employees employed "at the time" who will be covered by the agreement. On an ordinary reading of the text, the "time" being referred to is the time of the request, and no party in the appeal contended otherwise. This was also the conclusion reached by Jessup J in Swinburne: "Those to whom a request under s 181(1) should be addressed are confined, in my view, to those who are employed at that time". This must at least encompasses the precise time at which the request is made, which as earlier stated is to be located at the end of the access period and immediately before or at the commencement of the voting process. However in ordinary usage the phrase "at the time" may, depending on the context, also encompass a broader period in which a relevant event is located. In Swinburne, Jessup J expressed the following view:

"[25] It is not necessary to consider whether employees to whom a copy of the proposed agreement was given under s 180 should, or may, be included within the requested group under s 181. The present case does not depend on such fine distinctions. However, and although the question was not argued, I would be disposed to the view that the "time" referred to in s 180(2)(a) is the whole of the "access period". Since that period is, at its later boundary, contiguous with the time of the request under s 181, the better view may be that such employees should be so included."

We would likewise prefer an approach whereby the "time" of the request referred to in s 181(1) encompasses the whole of the access period and is to be equated to the "time" referred to in s 180(2)(a). As earlier stated, s 180(1) obliges the employer to comply with the requirements set out in the section, and the evident policy purpose of that obligation and the specific requirements in s 180(2), (3) and (5) is to ensure that before a vote upon a proposed agreement commences, the employer has taken all reasonable steps to ensure that employees have access to a copy of the agreement, have had it explained to them, and have been informed of the time, place and method of the vote. These steps may broadly be characterised as directed at endeavouring to ensure that there is an "informed electorate" which is capable of genuinely agreeing to a proposed enterprise agreement. That statutory purpose would obviously be best achieved if those employees to whom a request may be directed under s 181(1) constitute the same group of employees in relation to whom the requirements of s 180(2), (3) and (5) apply. Conversely, the achievement of that purpose would be undermined if employees to whom these requirements did not apply because they were not employed at the time referred to in s 180(2)(a) could nonetheless be requested to vote to approve a proposed agreement pursuant to s 181(1).

[34] It is evident that the requirements in s 180(2), (3) and (5) operate in respect of the same cohort of employees. Section 180(2) establishes a defined term, "the relevant employees", in relation to whom the requirement in that provision operates, and the same term is then used in respect of the requirements in s 180(3) and (5) despite the fact that the requirements operate at different times. "Relevant employees" are (in s 180(2)(a)) "the employees employed at the time who will be covered by the agreement". This is the same formulation as is used in s 181(1), albeit that the "time" referred to is "during the access period". In this connection, it is noteworthy that the Explanatory Memorandum says (at paragraph 732):

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<sup>&</sup>lt;sup>18</sup> [2015] FCAFC 98, 232 FCR 246 at [24]

"The relevant employees are the employees employed during the access period that will covered by the agreement. This may include new employees that commence employment during that period."

[35] In relation to the obligation to provide access to the proposed agreement, the Explanatory Memorandum also states (at paragraph 740):

"There may also be situations where an employee commences employment or returns to work during the access period. For example, a new employee may commence employment during the access period or an existing employee who was leave, such as maternity leave, may return to work during the access period. In situations such as these, the employer must take all reasonable steps to ensure that the employee is given a copy of the agreement and other materials on the day the employee commences employment or returns to work. FWA will consider whether the employer took all reasonable steps to ensure that relevant employees were given access to the agreement during the access period in deciding whether to approve the agreement."

[36] The above passages indicate an express acknowledgement that the constitution of the workforce may change during the access period and an intention to accommodate this by ensuring that new employees are included in the fixed cohort of employees to whom the s 180 requirements relate. It is also implicit that if new employees engaged during the access period will form part of the fixed cohort of "relevant employees" for the purpose of the s 180 requirements, this cohort will not crystallise until the end of the access period. That is the same time at which the employer may, pursuant to s 181(1), make a request that employees employed at that time who will be covered by the agreement vote to approve it. This supports the conclusion that the requirements in s 180(2), (3) and (5) and the request that may be made pursuant to s 181(1) once these requirements have been complied with operate by reference to the same cohort of employees.

In the Decision, the Deputy President determined that those to whom a request might be directed under s 181(1) includes employees first engaged in the period from the commencement of the voting process until its end, and also casual employees who worked in that period but who did not work during or at the end of the access period. The basis of that approach is not identified in the Decision. It was not arrived at through any process of the proper construction of s 181(1). The Deputy President made reference <sup>19</sup> to Swinburne and to a Full Bench decision which summarised the effect of Swinburne, CFMMEU v Noorton Pty Ltd t/a Manly Fast Ferry, 20 but neither of these decisions provides any support for the approach taken by the Deputy President. It is, with respect, logically nonsensical that a request for employees to vote to approve a proposed agreement remains operative on an ongoing basis even after voting has already commenced and even, perhaps, after a majority have already voted to approve the agreement and it has therefore been "made" in accordance with s 182(1). Such an approach would defeat the purpose of s 180, since it would allow newly-engaged employees to vote who had not been given access to the agreement or have it explained to them. It would also give rise to the practical difficulty, where there is an extended voting period, that an employer would have to continually add to the "roll" of voters and provide

<sup>&</sup>lt;sup>19</sup> [2019] FWC 6105 at [22]

<sup>&</sup>lt;sup>20</sup> [2018] FWCFB 7224 at [19], [23]

with a means of voting any new employees who are engaged up until the very end of the voting process. That practical difficulty is amply illustrated in this case whereby Kmart, which erroneously took the same approach as the Deputy President, attempted to add to the voting cohort employees employed on or after 21 November 2018, but could not reach a practical solution as to how employees employed on or after 28 November 2018 could be added to the electronic voting system and therefore introduced an arbitrary cut-off date. We consider it unlikely that the FW Act intended to establish a hitherto unknown and novel process of voting whereby the "roll" of voters is not closed when voting commences, but may be added to as voting continues.

- [38] We note the references to s 172(2)(a) and s 182(2) in the submissions of the RFFWUI. Section 172(2)(a) is not without difficulty, but it is best understood as doing no more than identifying with whom an employer is taken to make a single-enterprise non-greenfields agreement. It does not prescribe to whom a request under s 181(1) is to be directed. Section 182(2) is not relevant because it is concerned with multi-enterprise non-greenfields agreements.
- [39] We conclude therefore that the Deputy President adopted an incorrect construction of s 181(1) which caused her to erroneously dismiss the application for approval of the Agreement on the basis that employees employed on 29 and 30 November 2018 and perhaps 28 November 2018 had been denied an opportunity to vote in contravention of the statutory requirement. Such employees, if they were not employed by Kmart at the "time" referred to in s 181(1) as we have earlier construed it, did not have any entitlement to participate in the voting process.
- [40] The conclusion we have reached makes it unnecessary to determine the other grounds of appeal, including the grounds alleging a denial of procedural fairness. It is sufficient to say that if the issue which caused the Deputy President to dismiss the application for approval of the Agreement had been squarely identified as a matter of concern to Kmart, it would have been in a position to adduce the evidence of Ms White which it adduced before us. As earlier explained, that evidence demonstrates that no employee hired in the period 28-30 November 2018 worked any shift or undertook any paid induction training during that period. Even on the Deputy President's construction of s 181(1), which we have found to be in error, no employee was denied the opportunity to vote on the basis surmised in paragraph [71] of the Decision.
- [41] For the reasons set out above, we uphold the appeals and quash the Decision.

#### Re-determination of the application for approval of the Agreement

[42] It is necessary; in light of the conclusion we have reached concerning the appeals, for Kmart's application for approval of the Agreement to be re-determined. We consider that the most convenient course is for us to undertake this task ourselves. The issues associated with the application were fully litigated before the Deputy President and in her Decision the Deputy President expressed her views concerning all of the contested statutory approval requirements notwithstanding the basis upon which she dismissed the application. That enables us to deal with the approval requirements in an efficient manner and without further delay.

Genuine agreement

[43] In relation to that element of the genuine agreement requirement in s 188(1)(b), there remains an issue to be dealt with arising from the fact that Kmart erroneously included in the voting cohort persons employed after the start of the voting process on 21 November 2018 up to 28 November 2018 who had not been employed immediately before the commencement of the voting process or during the access period. It is necessary to consider whether this error is capable of affecting the conclusion that a majority of employees who were eligible to vote in accordance with s 181(1), and who voted, cast a valid vote to approve the Agreement. The reported outcome of the vote (in the Form F17 statutory declaration of Ms White) was that 23,110 employees voted, and 21,191 of those voted in favour of approval of the Agreement. We were advised by senior counsel for Kmart, and we accept, that its records disclosed that 1,422 employees who were employed after the voting process commenced but had not been employed at the time of the request/access period were included in the voting cohort. That being the case, it is clear that Kmart's error could not have affected the overall result and that the Agreement was made in accordance with s 182(1).

[44] In relation to the other elements of the genuine agreement requirement set out in s 188(1) that were in contest, the Deputy President found that Kmart had:

- taken all reasonable steps to give the notice of employee representation rights in accordance with s 173(1);<sup>21</sup>
- taken all reasonable steps to ensure employees were given or had access to incorporated materials during the access period in accordance with s 180(2);<sup>22</sup> and
- appropriately explained the terms and effect of the Agreement to relevant employees in accordance with s 180(5).<sup>23</sup>

[45] We agree with and adopt these findings. We are satisfied as to all the elements of genuine agreement prescribed by s 188(1). Accordingly we are satisfied that the Agreement was genuinely agreed to by the employees covered by it as required by s 186(2)(b).

Better off overall test

[46] The record of proceedings below show that a number of concerns in relation to whether the Agreement passed the BOOT were raised with Kmart, and that in response Kmart offered a number of undertakings to address these concerns. The Decision identifies the concerns that were addressed by the undertakings as follows:

"[141] In addition to the less beneficial terms details above, Kmart's Proposed Undertakings have been offered to address 10 less beneficial terms identified in the Agreement regarding:

- a) Definition of the adult rate of pay;
- b) Payment of wages on termination;

<sup>&</sup>lt;sup>21</sup> Ibid at [89]-[98]

<sup>&</sup>lt;sup>22</sup> Ibid at [99]-[103]

<sup>&</sup>lt;sup>23</sup> Ibid at [104]-[107]

- c) First aid allowance;
- d) Uniform allowance;
- e) Overtime rates of pay day work team members;
- f) Public holidays;
- g) Requests for flexible work;
- h) Day work and night work shift changes;
- i) Union matters (right of entry);
- j) Rates of pay as at the test time.
- [47] The undertakings that were offered are set out in Attachment 5 to the Decision, and need not be reproduced here. The Decision records that the SDAEA and the AWU supported acceptance of the undertakings, but that the RFFWUI opposed them (for reasons not identified in the Decision).
- [48] We agree with and adopt the conclusion that the presence in the Agreement of the less beneficial terms identified in the passage from the Decision above gives rise to a concern that the Agreement does not pass the BOOT approval requirement in s 182(2)(d). Our provisional view is that the undertakings offered address the concern insofar as these terms are concerned and are not likely to cause financial detriment to any employee covered by the Agreement or result in substantial changes to the Agreement. Although the bargaining representatives for the Agreement (the SDAEA, the AWU and the RFFWUI) have already responded to these undertakings as recorded in the Decision, for more abundant caution we will provide them with a further opportunity to express their views concerning the undertakings to ensure that the requirement in s 190(4) is satisfied.
- [49] Additional to these matters, the Deputy President identified two other provisions in the Agreement which she characterised as less beneficial terms which were not addressed by the undertakings and which caused her to maintain a concern in respect of satisfaction of the BOOT. The first was clause 7.8 of the Agreement, which concerns superannuation. Relevantly it provides:

#### 7.8 Superannuation

- 7.8.1 Kmart shall be a participating employer of the Retail Employees Superannuation Trust (REST) and shall participate in accordance with the Fund Trust Deed.
- 7.8.2 Kmart shall contribute monthly to REST on behalf of each eligible team member the required level of superannuation contribution by low.
- 7.8.3 At the commencement of this Agreement the required contribution by low is 9.5% of ordinary time earnings. Ordinary time earnings shall be calculated in accordance with subsection 6(1) of the Superannuation Guarantee (Administration) Act 1992.
- 7.8.7 If, during the life of this Agreement, Kmart becomes obligated by law to provide choice of fund for the team members to whom this Agreement applies, Kmart shall make contributions on behalf of any team member who nominates an alternate fund to the fund so

nominated in accordance with this clause. REST shall remain the default fund for the purposes of this clause. Where a team member nominates an alternative fund, references to REST in this clause, shall in that event be read as the alternate fund so nominated.

- [50] It may be noted that clause 7.8.7 is a provision which (if the Agreement was approved) would not have current effect, but is a contingent provision which would take effect upon certain legislative changes occurring.
- [51] The reference award for the purpose of the BOOT in relation to the application for approval of the Agreement is the *General Retail Industry Award 2010* (Award). Clause 22 of the Award relevantly provides:

#### 22. Superannuation

#### 22.1 Superannuation legislation

- (a) Superannuation legislation, including the Superannuation Guarantee (Administration) Act 1992 (Cth), the Superannuation Guarantee Charge Act 1992 (Cth), the Superannuation Industry (Supervision) Act 1993 (Cth) and the Superannuation (Resolution of Complaints) Act 1993 (Cth), deals with the superannuation rights and obligations of employers and employees. Under superannuation legislation individual employees generally have the opportunity to choose their own superannuation fund. If an employee does not choose a superannuation fund, any superannuation fund nominated in the award covering the employee applies.
- (b) The rights and obligations in these clauses supplement those in superannuation legislation.

#### 22.2 Employer contributions

An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.

. .

#### 22.4 Superannuation fund

Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause 22.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clause 22.2 and pay the amount authorised under clauses 22.3(a) or (b) to one of the following superannuation funds or its successor:

- (a) the Retail Employees Superannuation Trust (REST);
- (b) Sunsuper;

- (c) Statewide Superannuation Trust;
- (d) Tasplan;
- (e) MTAA Superannuation Fund;
- (f) any superannuation fund to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008, provided the superannuation fund is an eligible choice fund and is a fund that offers a MySuper product or is an exempt public sector scheme; or
- (g) a superannuation fund or scheme which the employee is a defined benefit member of.
- [52] In relation to the capacity of employees to make a choice of superannuation fund under clause 7.8 of the Agreement as compared to clause 22 of the Award, the Deputy President said:
  - "[127] ... The Award expressly nominates a list of funds that may be applied to Award-covered employees if they have not made their own choice of fund in accordance with the superannuation legislation. The Award enables a choice to be made under the superannuation legislation and otherwise supplements the legislation by narrowing the applicable funds for Award-covered employees in circumstances where no such choice is made. Under the Agreement there is only one superannuation fund into which employee contributions are paid."
- [53] The conclusion stated by the Deputy President is obviously correct and we adopt it. The issue then becomes whether, for the purpose of an analysis as to whether the Agreement passes the BOOT, the lack of employee choice as to their superannuation fund renders clause 8.7 less beneficial than clause 22 of the Award. In this respect the Deputy President said (footnotes omitted):
  - "[128] As the better off overall test requires an identification of more and less beneficial terms, the question remains as to whether the superannuation provision is less beneficial, and if so, the weight to be attributed to this issue in making an overall assessment of whether employees are better off overall.
  - [129] The absence of evidence in relation to this issue has not assisted the Commission in reaching the necessary satisfaction as to the better off overall test. Whilst it was Kmart's view that it is 'not appropriate for the Commission to require any evidence about the performance of the superannuation fund, including REST', the difficulty in assessing this condition as more or less beneficial to employees, in the absence of any evidence, was raised directly at the hearing, with Kmart ultimately choosing not to file any evidence that may have assisted the Commission on this issue.
  - [130] To the extent that Kmart asks the Commission to rely on s.193(7) to 'assume' employees are better off overall in the absence of any evidence, that submission is misplaced. Section 193(7) permits the Commission to make assumptions about certain

classes of employees being better off overall (rather than requiring the Commission to inquire into each individual employee's circumstances) however the Commission is still bestowed with the obligation to reach the level of satisfaction in relation to each class of employee and the applicant ultimately bears the onus of achieving that satisfaction.

[131] The Award itself describes the choice that may be made under the superannuation legislation (preserved by its terms) as an 'opportunity' strongly suggesting a benefit in the ability to exercise that choice.

[132] The Financial System Inquiry included a recommendation to 'provide all employees with the ability to choose the fund into which their Superannuation Guarantee contributions are paid' based on its findings of the detrimental impacts of restrictions on choice of fund including additional fees through maintenance of multiple funds, the longer term impact on superannuation savings and the particular vulnerabilities of casual employees to restrictions on choice.

[133] On the materials before the Commission regarding the superannuation provision in the Agreement, I am only able to objectively conclude that the Agreement's restriction on the choice of superannuation fund that would otherwise exist under the Award is a less beneficial term. On one view this may be non-monetary and accordingly difficult to quantify. It may be monetary to the extent that the performance of the REST fund is less than what an employee might otherwise prefer or that employees required to have multiple funds are required to pay multiple fund fees. Whether the detriment is properly characterised as monetary or non-monetary, the potential for a class of employee or prospective employee to suffer it as against the Award is real notwithstanding the difficulty in its quantification.

. . .

[142] Even if the Proposed Undertakings were accepted, they do not adequately address all of the less beneficial terms in particular the removal of choice of superannuation fund. In circumstances where the value of the objectively verifiable benefits under the Agreement is the minimum possible above Award for certain classes of employees and/or prospective employees to be covered, and in the absence of materials to persuade the Commission otherwise, on an overall assessment I am not able to be satisfied that employees and prospective employees are better off overall under the Agreement than if the Award applied."

- [54] We agree that the presence of clause 8.7 in the Agreement gives rise to a *concern* (within the meaning of s 190(1)(b) and (2)) that the Agreement does not pass the BOOT, in circumstances where, for at least some classes of employees, the Agreement is apart from clause 8.7 only more beneficial overall than the Award by a fairly narrow margin. We emphasise that the identification of a concern in relation to whether a particular agreement meets an approval requirement in s 186 or s 187 does not necessarily involve a final determination about the issue; it is sufficient that there is an apprehension or perturbation that the requirement in question may not be satisfied.
- [55] Our concern in relation to clause 8.7 does not arise from any issue concerning the relative performance of different superannuation funds, as touched upon in paragraphs [129] and [133] of the Decision. The retirement benefits that might ultimately be produced by different superannuation funds for particular employees, in many cases decades after a

particular enterprise agreement has ceased to operate, is a matter too remote and incapable of sensible prediction to bear upon the BOOT. Further, the existence of an employee right of choice cannot be any guarantee that the employee will choose the superannuation fund which will ultimately best serve the employee's financial interest, since it equally allows for bad choices and choices made with insufficient information.

- [56] Rather, our concern arises from the particular circumstances of Kmart's workforce, two-thirds of which are casual employees. Our assessment, having regard to the general characteristics of employment in the retail industry, is that it is likely that a significant proportion of such casual employees have previously had other casual employment or have a second job. In that context, a choice of funds may be a benefit so that the casual employee can seamlessly remain in a single superannuation fund rather than having two or more funds arising from different jobs with all the inconvenience and additional administration costs that this involves. To this extent, we agree with the some of the matters adverted to in paragraphs [131]-[133] of the Decision. However, against this, it is necessary to acknowledge, as Kmart submitted, that s 32C(6)(h) of the Superannuation Guarantee (Administration) Act 1992 provides that a contribution to a fund made under or in accordance with an enterprise agreement constitutes compliance with the employee choice of fund requirements of that Act. It might be considered paradoxical that a provision of an enterprise agreement which facilitates satisfaction of the choice of funds requirement in the superannuation legislation is capable of being characterised as a less beneficial term because it denies a right of choice.
- [57] Upon invitation, Kmart proposed an undertaking at the hearing before us which would address our concern. The undertaking would involve an amendment to clause 7.8.7 as follows:
  - 7.8.7 If, during the life of this Agreement, Kmart becomes obligated by law to provide choice of fund for the team members to whom this Agreement applies, Kmart shall make contributions on behalf of any team member who nominates an alternate fund to the fund so nominated in accordance with this clause. REST shall remain the default fund for the purposes of this clause. Where a team member nominates an alternative fund, references to REST in this clause, shall in that event be read as the alternate fund so nominated.
- [58] The effect of the amendment would be to remove the contingent element of the provision so that it would become operative immediately upon the Agreement taking effect and afford employees in the first instance a right to choose their preferred superannuation fund, with REST operating as the default fund for employees who decline to nominate another fund. The SDAEA and the AWU supported the acceptance of this undertaking. The RFFWUI opposed it, although it acknowledged that it would address the identified concern.
- [59] Our provisional view is that the proposed undertaking would address our concern and not be likely to cause financial detriment to any employee covered by the Agreement or result in substantial changes to the Agreement. We will provide the bargaining representatives with a (further) opportunity to express their views concerning the proposed undertaking pursuant to s 190(4).
- [60] The Deputy President identified a second provision in the Agreement, concerning the span of ordinary hours, which she considered detrimental to employees compared to the Award. Under clause 10 of the Agreement, the span of ordinary hours for day workers is

6.00am to midnight Monday-Sunday, and for night shift workers the shift must commence at or after 11.00pm one day and finish before 5.00am the following day. The pay rate schedules attached to the Agreement (relevantly) provide for specified higher rates for day work employees for work performed during 6.00am-7.00am Monday-Friday, 6.00pm-11.00pm Monday-Friday, 11.00pm-midnight Monday-Friday, 6.00am-7.00am Saturday, 7.00am-11.00pm Saturday, 11.00pm-midnight Saturday, 6.00am-9.00am Sunday, 9.00am-11.00pm Sunday, 11.00pm-midnight Sunday and on public holidays respectively. Night shift workers also receive specified loaded rates for shifts worked Monday-Friday, Saturday, Sunday and on public holidays respectively.

[61] By comparison, clause 27.2(a) of the Award provides that standard ordinary hours may be worked within 7.00am-9.00pm, Monday to Friday; 7.00am-6.00pm on Saturday and 9.00am-6.00pm on Sunday. Clause 27.2(b)(iii) provides however that, for retailers whose trading hours extend beyond 9.00pm Monday to Friday or 6.00pm on Saturday or Sunday, the finishing time on all days of the week will be 11.00pm. We note that Kmart stores generally close at 10.00pm at the earliest, and many close at a later time or operate on a 24 hour basis. Clause 30 of the Award relevantly provides that shiftwork (consisting of shifts starting at or after 6.00pm on one day and before 5.00am the following day) will be paid at a rate of 130% Monday-Friday, 150% on Saturday and 190% on Sunday, with the casual loading payable in addition. The Sunday rate will fall to 175% from 1 July 2020. Clause 29.2 provides that other work performed outside of the span of hours is to be paid at overtime penalty rates.

#### [62] The Deputy President said in relation to this issue:

"[139] Again, the absence of evidence including a lack of any scenarios relative to particular rosters, stores or to classes of employees has not assisted the Commission in reaching the requisite satisfaction. Again, I do not consider it the Commission's task to speculate as to the individual impacts of such provision. However, on the objective material before the Commission, I conclude that there is a detriment to be considered in making an overall assessment of the better off overall test."

We do not, with respect, agree with the Deputy President's assessment. Financial modelling undertaken by the Commission's staff (which was before the Deputy President) demonstrates that the pay of employees under the Agreement will be more than under the Award on any pattern of hours that may be worked. There was no dispute about the accuracy of that modelling. The RFFWUI contended before the Deputy President that there were nonfinancial detriments associated with the wider span of hours including "limitations on the right to refuse to work in the increased span of hours, in addition to matters that related to what may be described as individual lifestyle preference". 24 However if Kmart was under the Award, it would be entitled to cover its trading hours using the shiftwork provisions or by rostering ordinary hours outside the span and paying penalty rates in accordance with clause 29.2, and the Award does not contain any "right to refuse" such work in either case. Further, for full-time and part-time employees, clause 16.1.4 of the Agreement requires Kmart to take into consideration employees' family responsibilities and safe transport home in establishing or changing rosters. No equivalent provision exists in the Award. We therefore do not consider that clause 10 of the Agreement, in combination with the other provisions of the Agreement which we have identified, is to be characterised as a detrimental provision for the purpose of the BOOT analysis.

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<sup>&</sup>lt;sup>24</sup> Ibid at [138]

**[64]** Our conclusion is that, if the undertakings proposed by Kmart are accepted pursuant to s 190, the Agreement passes the BOOT.

Other approval requirements

[65] We are satisfied that the other applicable requirements of ss 186 and 187 are met in relation to the Agreement.

#### Conclusion

- [66] We make the following orders and directions:
  - (1) Permission to appeal is granted with respect to each appeal.
  - (2) The appeals are upheld.
  - (3) The Decision ([2019] FWC 6105) is quashed.
  - (4) Kmart is directed to file and serve a consolidated and signed copy of the proposed undertakings referred to in this decision within two days of the date of this decision.
  - (5) The bargaining representatives (the SDAEA, the AWU and the RFFWUI) are directed to file and serve any written submissions they wish to make expressing their views concerning the proposed undertakings referred to in this decision pursuant to s 190(4) of the FW Act within seven days of the date of this decision.



#### **VICE PRESIDENT**

#### Appearances:

C O'Grady and M McKenney of Counsel on behalf of Kmart Limited.

W Friend QC and D Bruno of Counsel on behalf of the Shop Distributive and Allied Employees' Association.

S Young on behalf of the Australian Workers' Union.

J Cullinan and M Cornthwaite on behalf of the Retail and Fast Food Workers Union Incorporated.

# Hearing details:

2019.

Sydney: 4 November.

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